Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERM: October 1995

CARLSBAD MUNICIPAL SCHOOL DISTRICT)
and the CARLSBAD MUNICIPAL SCHOOL)
BOARD OF EDUCATION,)
)
Petitioners)
vs.)
CATHERINE DADDOW,)
)
Respondent)

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

PETITION FOR WRIT OF CERTIORARI

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The Supreme Court of the State of New Mexico rendered a decision in *Catherine Daddow v. Carlsbad Municipal School District and Carlsbad Municipal Schools Board of Education, 34 S.B.B., No. 28, Pg. 11 (May 2, 1995)*, in which the Court held that school districts and school boards of education are "persons" subject to suit under **42 U.S.C. §1983**. Such holding is in direct conflict with the opinions rendered by the United States Court of Appeals for the Tenth Circuit in ***Martinez v. Board of Education of Taos Municipal School District, 748 F.2d 1393 (10th Cir. 1984)***; ***Maestas v. Board of Education of Mora Independent School District, 749 F.2d 591 (10th Cir. 1984)***, and ***Garcia v. Board of Education of Socorro Consolidated School Dist., 777 F.2d 1403 (10th Cir. 1985)***.

Questions Presented:

1). Whether the State Court usurped the authority of the Federal Courts by attempting to override settled federal law established by the Tenth Circuit Court of Appeals.

2). Whether the action of the State Court violated

the Supremacy Clause of Article VI of the Constitution of the United States by attempting to reinterpret various decisions of the Supreme Court of the United States.

3). Whether state courts are conclusively bound by a lower federal court ruling which decides an issue of federal law.[1]

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[1] All parties to the proceeding in the State Court are named in the caption of this Petition.

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Opinion Below

The opinion of the New Mexico Supreme Court has been published in the advance sheets of the New Mexico State Bar Bulletin in Vol. 34, No. 28, Page 11, of the July 13, 1995, printing. The opinion has not yet been reported in the state and regional reports. The decision of the trial court is not reported.

Jurisdiction

The decision of the Supreme Court of New Mexico, for which this Petitioner seeks review, was entered on May 2, 1995. Petitioner timely filed a Motion for Rehearing. The Order denying Petitioner's Motion for Rehearing was entered on June 14, 1995.

This Court has jurisdiction to review the Judgment of the State Supreme Court, pursuant to *28 U.S.C. §1257(a) (1948)*:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the

> Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties of or statutes of, or any commission held or authority exercised under, the United States.

Constitutional Provisions and Statutes Involved.

1. Article Six, Clause 2, United States Constitution, which provides:

> This Constitution and the laws of the United States, which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or laws of any state to the contrary notwithstanding.

2. The Eleventh Amendment, United States Constitution, which provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

3. The statute under which Plaintiff filed her Complaint in the State District Court was 42 U.S.C. §1983 (1982), which provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United Sates or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Statement of the Case.

The facts necessary to review the questions raised in this Petition are briefly stated as follows:

1. Course of the proceedings in the State Court.

Catherine Daddow, the Plaintiff in the State Court, had been employed by Petitioner as Director of Food Services for the school district. On July 11, 1989, the Plaintiff was terminated from her employment with Petitioner. Catherine Daddow subsequently filed a lawsuit in the District Court for the Fifth Judicial District, Eddy County, New Mexico, on June 21, 1990. Catherine Daddow's first Complaint was dismissed based upon the Petitioner's immunity under the State Tort Claims Act. Catherine Daddow subsequently filed an Amended Complaint alleging a cause of action under 42 U.S.C. §1983. Petitioner moved to dismiss the Amended Complaint on the grounds that the school district and its board of education, as arms of the State, were immune from suit under §1983. The Trial Court granted Petitioner's Motion to

Dismiss and gave leave to the Plaintiff to file an interlocutory appeal. On June 12, 1991, the State Supreme Court remanded the case to the Trial Court for trial on the issues of breach of employment contract and wrongful termination (Order on Remand, Appendix, 81). Also, the Supreme Court instructed the Trial Court that it could reinstate the §1983 cause of action if the Court deemed it advisable..Id. However, the Trial Court abided by its prior ruling and the case proceeded to trial only on the contract claim and wrongful termination claim.

The bifurcated trial on the merits was held on August 18 through August 21, 1992, and January 4 through January 6, 1993. During the trial, counsel for Petitioner elicited evidence that the Plaintiff had received all due process to which she was entitled, and that good cause existed for her termination. At the close of Daddow's Case in Chief, Petitioner moved for dismissal of the Complaint, which Motion was granted. On January 29, 1993, the Court entered its decision with findings and conclusions (Appendix, 68), and Judgment was entered on

April 2, 1993 (Appendix, 78). Although the Trial Court found that Catherine Daddow was negligent in her duties as Food Services Director and that such negligence caused Petitioner to suffer damages, the Trial Court refused to assess those damages against Catherine Daddow. The Trial Court ruled that Petitioner, as an arm of the State, was immune from suit under §1983. In addition, the Trial Court ruled that even if Petitioner had been subject to suit, the Plaintiff's claim failed because she received all due process to which she was entitled (Court's Decision, Conclusion No. 4, Appendix 77). As a result of the Trial Court's Judgment, Daddow filed an appeal and Petitioner filed a cross-appeal with the New Mexico Supreme Court in Docket No. 21284.

Catherine Daddow, on appeal, attempted to raise the issue of whether Petitioner is subject to suit under 42 U.S.C. §1983 (Appellant's Brief-in-Chief). Because of this Court's decision in ***Will v. Michigan Department of State Police, 491 U.S. 58 (1989)***, which determined that arms of the State are

not "persons" subject to liability, and decisions from the Court of Appeals for the Tenth Circuit, which held that school districts and local boards of education in New Mexico are arms of the State, Petitioner considered the issue settled and moot because of trial courts decisions that she received all process due. Petitioner, in its Answer Brief, simply cited the controlling federal law and moved on to the issues upon which the lower Court based its decision (see Appellee's Answer Brief).

Despite the clear lack of briefing on the issue of §1983 immunity, and despite the fact that this issue was irrelevant to the outcome, the State Supreme Court gratuitously considered this issue in its decision. The case was presented to the Supreme Court through oral argument on November 10, 1993. However, the Court did not enter its decision until May 2, 1995, after one Justice had resigned and another was appointed. Justice Minzner, who had not been on the bench when the case was presented, enabled the Court to reach a

majority decision. This decision places New Mexico in direct conflict with settled law as decided by this Court (Frost, J., specially concurring, Appendix 37).

The State Supreme Court devoted the majority of its Opinion and Judgment to a discussion of the federal question concerning immunity from suit under §1983 (Opinion, Appendix 1-28). The State Supreme Court ultimately upheld the validity of Catherine Daddow's termination, but reversed the Trial Court on the legal question of Petitioner's statutory and constitutional immunity from liability under 42 U.S.C. §1983.

Reasons for Granting Writ

The Supreme Court of the State of New Mexico has decided a federal question in a way that conflicts with the decisions of this Court, as well as decisions from the Tenth Circuit Court of Appeals.

This case involves governmental immunity from suit under 42 U.S.C. §1983, pursuant to the Eleventh Amendment

to the United States Constitution. At the beginning of the merits trial, the Judge ruled that the case would be tried under a breach of contract claim, and he would abide by his prior ruling that the Defendants were immune to suit under Section 1983. However, the Plaintiff's attorney stated that he was going to put on evidence concerning Plaintiff's due process claims. When the Trial Judge responded that he would allow such evidence, Defendants' attorney was forced to defend against the due process claim under a continuing objection (Transcript of Proceedings, 8/18/92, Tape 1: Counters 800-900)[2].

The Trial Court ultimately held that the Plaintiff's contract was properly terminated for cause and Judgment was rendered against her (Appendix, 78). However, since the Plaintiff's due process claim was litigated over the objection of Defendants, the Court also addressed the Section 1983 issues.

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[2]The merits trial was recorded on a Lanier Advocate IV No. 154665, and the tapes of the proceeding are included in the record on appeal to the State Supreme Court.

The Trial Court's conclusion on this matter is as follows:

> No claim against the School District and School Board under 42 U.S.C. §1983 is available to Plaintiff, under ***Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.lt. 2304, 105 L.Ed. 2d 45 (1989)*** and ***Martinez v. Board of Education of Taos Municipal School District, 748 F.2d 1393 (10th Cir. 1914)***. However, if Plaintiff could state a claim involving Federal due process statutes, the Court would hold that Plaintiff was afforded all process required.

(Appendix, 77).

On appeal, the Plaintiff once again raised the issue of whether the Petitioner before this Court, could be subject to suit under Section 1983. The State Supreme Court, in a sharply divided Opinion, arbitrarily abrogated the Petitioner's status as an arm of the State immune from damages liability under Section 1983 (Appendix, 1-67).

Petitioner respectfully urges that this decision is erroneous and at variance with the decisions of this Court and

the Tenth Circuit Court of Appeals in the following aspects:

1). The Dichotomy Involving the Immunity of State Entities for Purposes of the Eleventh Amendment and 42 U.S.C. §1983.

The Opinion of the State Supreme Court in this matter has far reaching and drastic consequences. The State of New Mexico has eighty-nine (89) independent school districts. Prior to the decision in this case, each of these districts could plan its yearly budget with the reasonable assurance that the district would not have to defend against civil rights claims under Section 1983. If the decision below is allowed to stand, each of these districts can reasonably expect to be subjected to a large financial burden as the result of having to spend unnecessary resources to defend Section 1983 complaints.

Although a reversal of the State Court will not affect the outcome of the case, the State Court decision is ripe for review because of the nature of the question decided. If the State Court decision is allowed to stand, Petitioners, along with

88 other school districts in the state, will be subjected to litigation which is unnecessary. See ***Honig v. Doe, 484 U.S. 305, 318 (1988); Cox Broadcasting Corp. v. Cohn, 420 U. S. 469, 482-483, 485-487 (1975).***

The State Supreme Court apparently perceived a dichotomy between "arms of the state" for Eleventh Amendment purposes and "arms of the state" for Section 1983 purposes (Appendix, 40-51 (Frost, J., specially concurring)). In contrast, this Court has already resolved any such dilemma in prior decisions. First, the Eleventh Amendment is a jurisdictional defense to suits in federal courts against states and state entities under Section 1983. See ***E. G. Monroe v. Pape, 365 U.S. 167 (1961).*** However, prospective injunctive relief against a state may be obtained. ***Edelman v. Jordan, 415 U.S. 651, 677 (1974).*** Liability under Section 1983 has been extended to municipalities and similar local government bodies. See ***Monell v. Department of Social Services of City of New York, 436 U.S. 658 (1978).*** However, this Court was

careful to limit such liability to governmental units which are not part of the State for purposes of the Eleventh Amendment. Id. *690, n.54.* Further, this Court has observed that Congress did not intend "for §1983 to override the traditional sovereign immunity of the states." ***Quern v. Jordan, 440 U.S. 332, 341 (1979).*** A Plaintiff cannot circumvent this congressional purpose by bringing suit in State Court. To allow a suit to proceed on a federal question in State Court when the same suit would be barred by the Eleventh Amendment in Federal Court would be illogical. ***Will v. Michigan, 491 U.S. at 66.*** Therefore, the Eleventh Amendment analysis is the same whether a suit is brought in State Court or Federal Court.

The State Supreme Court ignored this requirement to apply Eleventh Amendment analysis to determine if a governmental entity is a "person" for purposes of §1983. Instead, "the majority substitutes its own unique interpretation of the interplay of the Eleventh Amendment and §1983 which is contrary to the clear dictates of the Supreme Court."

(Appendix, 44, (Frost, J., specially concurring)). This Court has jurisdiction to review the state courts "unique interpretation" because such interpretation seriously erodes the federal policy recognizing a state entity's sovereign immunity. See ***Cox Broadcasting, 420 U.S. at 482-483, Quern, 440 U. S. at 341.***

2). The Federal Nature of the Question Decided by the State Court.

The State Supreme Court reversed the Trial Court and held that school districts and school boards of education are "persons" under Section 1983, thus are not immune from suit. (Appendix, 33). This decision directly contradicts the Tenth Circuit decisions in ***Martinez, Maestas, and Garcia,*** as referenced above. Contrary to the state court's assertion (Appendix, 9) the question of Petitioner's immunity under Section 1983 is a matter of federal law, and the resolution of such immunity is not the province of state law. See ***E.G. Budinich v. Becton Dickinson & Co., 486 U.S. 196, 198***

198 (1988); Martinez v. State of California, 444 U.S. 277, 284, Fn.8 (1980). When a governmental entity is sued under a federal right of action such as §1983, all defenses, including an assertion of sovereign immunity, are controlled by federal law. *Owen v. City of Independence, Mo., 445 U. S. 621, 647, Fn. 30 (1980).*

Pursuant to its responsibility, the Tenth Circuit carefully analyzed the nature of school districts and local school boards in New Mexico. *Martinez v. Taos School Board, 748 F.2d at 1394-96.* Furthermore, the Tenth Circuit considered this Court's decision in *Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)*, when analyzing the nature of school districts and school boards in New Mexico. *Martinez v. Taos School Board, 748 F.2d at 1394.* The Tenth Circuit has considered the same question in matters involving other states within the Tenth Circuit and reached an opposite conclusion based on the nature of school boards and school districts within those states. See, *Unified School District No.*

480 v. Epperson, 583 F.2d 1118 (10th Cir. 1978) (Kansas school districts are "persons"). *Ambus v. Granite Board of Education, 995 F.2d 992 (10th Cir. 1993)* (Utah school districts and boards are "persons"). Therefore, it is clear that the Tenth Circuit is capable of independently determining the Eleventh Amendment status of an entity under state law. In addition, the New Mexico Supreme Court had previously determined that school districts and boards of education were arms of the state protected by traditional sovereign immunity. *McWhorter v. Board of Education of Tatum Independent School Dist. No. 28, 63 N.M. 421, 320 P.2d 1025 (1958).* The State Supreme Court decision, which is the subject of this Petition, did not even address the *McWhorter* decision, much less overrule it. Congress did not intend for "§1983 to override the traditional sovereign immunity of the states." *Quern v. Jordan, 440 U.S. at 341.* Thus, the State Supreme Court was unquestionably in error when it held that these traditionally immune entities were "persons" for the purpose of

Section 1983 liability.

This case also involves a question of federal law which is unsettled, but should be settled by this court. The states are split on the issue of the conclusiveness of an opinion from a lower federal court which decides a question of federal law. As reported in ***147 ALR 857***, many jurisdictions have held that a decision by any federal court on a federal question is binding upon the state courts. **Id, 857-858.** In contrast, other jurisdictions take the view that only decisions from this Court are binding. **Id., 858-861**. Finally, a few jurisdictions follow the middle road and have refrained from stating a position one way or the other. **Id., 861.** Article Six, Cl. 2, clearly gives this Court the authority to settle the question of the supremacy of federal court decisions on questions of federal law. Therefore, Petitioners urge this Court to take advantage of this opportunity to settle the question.

Conclusion

The decision by the State Supreme Court, for which

review is sought, clearly raises three (3) questions subject to review by this Court. First, the state court's interpretation of decisions from this Court places the state court at odds with this Court. Second, the state court's decision is in direct conflict with the decisions of the Tenth Circuit concerning the same federal question. Finally, this case presents an opportunity for this Court to resolve an unsettled question of federal law. For these reasons, this Petition for a Writ of Certiorari should therefore be granted.

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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CATHERINE DADDOW,

Plaintiff-Appellant,
and Cross Appellee,

vs

No. 21,2184
Filed May 2, 1995

CARLSBAD MUNICIPAL SCHOOL DISTRICT and the CARLSBAD MUNICIPAL SCHOOL BOARD OF EDUCATION,

Defendants-Appellees
and Cross Appellants.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Fred A. Watson, District Judge

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OPINION

FRANCHINI, Justice.

Catherine Daddow appeals from a judgment dismissing her complaint in favor of the Carlsbad Municipal School District and the Carlsbad Municipal Board of Education (hereinafter collectively called "the District"). Daddow brought an action under 42 U.S.C. § 1983 (1988), alleging denial of due process and stating a cause of action for breach of employment contract and wrongful termination. After a bench trial, the court concluded that the District could not be sued under §1983, that the District did not breach Daddow's employment contract by wrongfully terminating her, and that even if a cause of action under §1983 did exist, Daddow was afforded all process that the Constitution requires both before and after her termination.

The District filed a cross-claim alleging that as a result of Daddow's negligent and wrongful acts, the federal government required the District to reimburse over $60,000 to the United States Department of Agriculture. The District

requested an award of damages for this loss. The court found that Daddow's failure to comply with federal regulations resulted in the loss to the District, that daddow failed to correct deficiencies noted by the federal auditor, and that Daddow's failure to properly do her job was just cause for her termination. The court refused to award damages to the District, however, because the District could not show that Daddow directly benefitted from her malfeasance. The court ruled that the District

s only recourse against Daddow was to terminate her employment. The District cross-appeals from this decision.

We conclude that the District, the Board, and its members are not absolutely immune from suit under § 1983. On the merits, the District showed that Daddow received due process and is therefore entitled to recover its costs in defending the suit. We further conclude that the District cannot recover the reimbursements from Daddow. We reverse in part but affirm the judgment of the trial court.

1. Local school boards and their members acting in

their official capacities are "persons" for purposes of actions based on § 1983. Section 1983 states, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

The trial court dismissed Daddow's cause of action under § 1983 because it believed that school boards and their members are absolutely immune from suit due to the holding in Will v. Michigan Department of State Police, 491 U.S. 58 (1989). The District offers the following analysis in support of the trial court's dismissal. Under Will, neither the State nor state officers sued in their official capacities are "persons" under §1983 except in an action for injunctive relief.[1] 491 U.S. at 71 & n.10. Will based this holding, in part, upon the fact that a state is protected from suit for money damages in federal

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[1] State officials sued in their personal capacities are "persons" under §1983. Hafer v. Melo, 502 U.S. 21, 23 (1991).

court under the Eleventh Amendment and the inference that Congress must not have intended different treatment in state court. Id. at 66-67. The Tenth Circuit has held that New Mexico school boards are "arms of the state" for purposes of the Eleventh Amendment. See Martinez v. Board of Educ., 748 F.2d 1393, 1396 (10th Cir. 1984). Therefore, neither school boards nor school board members acting in their official capacities may be sued for money damages under §1983 in either state or federal court. After carefully analyzing our constitutional provisions and statutes, the relevant cases that have examined both the characterization of school boards and the application of §1983, and the purpose of §1983, we conclude that the Tenth Circuit decision is erroneous and that our local school districts and their boards are "persons" under § 1983.

A. The purpose of §1983 according to Monell. The question before the Court in Monell v. Department of Social Serv., 436 U.S. 658 (1978), was "[w]hether local governmental officials and/or local independent school boards

are 'persons' within the meaning of 42 U.S.C. §1983 when equitable relief in the nature of back pay is sought against them in their official capacities." Id. at 662. In answering that question affirmatively, the Court examined the precursor to §1983, the Civil Rights Act of 1871. See Monell, 436 U.S. at 669. The Court first determined that the word "persons" covered more than natural persons, and was intended to cover legal persons as well. Id. at 683. The Court also noted that the meaning of the word "person" was applied "to bodies politic and corporate...unless the context shows that such words were intended to be used in a more limited sense," and that a municipality is a "body politic and corporate." Id. at 688 (quoting Act of Fed. 25, 1871, §2, 16 Stat. 431 (The Dictionary Act)). In looking at the legislative history of the Civil Rights Act, the Court stated that the Act was "intended to give a broad remedy for violations of federally-protected civil rights." Id. at 685. Therefore, the Court concluded, "since municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied

by [the Civil Rights Act], and, further, since Congress intended [the Act] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of [the Act]." Id. at 685-86.

> Congress did intend municipalities and other local government units to be included among those persons to whom §1983 applies. Local governing bodies, therefore, can be sued directly under §1983 for monetary, declaratory, or injunctive relief where... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.

Id. at 690. The Monell Court also overruled Monroe v. Pape, 365 U.S. 167, 191-92 (1961), in which the Court had previously held that municipalities were not "persons" under §1983. Monell, 436 U.S. at 696. It also emphasized that Congress had "rejected efforts to strip the federal courts of jurisdiction over school boards." Id. We interpret Monell's broad holding that all "local governing bodies" are subject to suit under §1983 to create a presumption that local school boards are included within the meaning of "person." See Howlett v. Rose, 496 U. S. 356, 376 (1990) (stating that state

courts must adhere to the Supreme Court's interpretation that local governing bodies are "persons" under §1983); John E. Nowak et al., Constitutional Law 55 (2d ed. 1983) ("[M]unicipal corporations, counties and school boards may be sued in federal court without raising an eleventh amendment issue." (footnotes omitted)). This presumption, based on §1983's strong protective purposes, can be overcome only by conclusive evidence that a local school board is legally only a state agency subject to the state's control. We must determine whether our local school boards are local governing bodies.

B. The Mt. Healthy test. We find guidance for determining whether an entity is a local governing body from Mt. Healthy City School District Board of Education v. Doyle, 429 U. S. 274, 280 (1977). Mt. Healthy held that an Ohio school board was not immune from suit under the Eleventh Amendment. 429 U. S. at 280. In its analysis, the Court examined "the nature of the entity created by state law." Id. The Court gave several reasons for deciding that the school board was not an "arm of the state." These reasons include

the facts that (1) under state law, the term "state" did not encompass "political subdivisions" such as local school districts, (2) even though the boards received guidance and significant money from the state, local boards had extensive powers to issue bonds and to levy taxes within restrictions, and (3) a board was more like a county or city than it was like an "arm of the state." Id. Accordingly, under Mt. Healthy, the local school board was not entitled to Eleventh Amendment immunity even though it was entitled to state governmental immunity in the same degree as the state in state tort suits. A determination of whether an entity is a local governing body depends upon state law.

C. Will did not limit Monell. We previously noted in dicta that Will "made it clear that the [Bernalillo Board of Education] and its members in their official capacities were not subject to suit for money damages under §1983." Carrillo v. Rostro, 114 N.M. 607, 610, 845 P.2d 130, 133 (1992). Despite this sweeping statement, however, Will actually stands only for the more limited proposition that "a State is not a

person within the meaning of §1983." Will, 491 U. S. at 64. The Will Court stated that §1983 provides a "federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity." Id. at 66. The Court emphasized, however, that the scope of the Eleventh Amendment and that of §1983 were separate issues. Id., and concluded that §1983 was not intended "to disregard the well-established immunity of a State from being sued without its consent." Id. at 67. The Court stated that Monell was fully consistent with its reasoning because "[b]y the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation." Id. at 68-69 n.7 (quoting Owen v. City of Independence, 445 U. S. 622, 646 (1980)). In contrast to Monell, in which the Court noted that Congress

intended school boards to be subject to actions under §1983, Monell, 436 U. S. at 696, in Will the Court stated that it could find nothing substantial in the Civil Rights Act's legislative history to convince it that Congress intended the word "person" to include the "States of the Union," Will, 491 U. S. at 69. The Court also noted that the phrase "body politic and corporate" did not include the States. Id.

D. A local board of education in New Mexico is not an "arm of the state." The Will Court noted that Monell limited its holding "to local government units which are not considered part of the State for Eleventh Amendment purposes," Will, 491 U.S. at 70 (quoting Monell, 436 U. S. at 690 n. 54), and limited its own holding to "States or governmental entities that are considered to be 'arms of the State' for Eleventh Amendment purposes." Id. (citing to Mt. Healthy, 429 U. S. at 280). Monell held that "person" applies to "bodies politic and corporate" notwithstanding state Eleventh Amendment protection. 436 U. S. at 669; see also Will, 491 U. S. at 77 (Brennan, J., dissenting) (stating that in a "case brought in

state court, the Eleventh Amendment can hardly be 'a consideration,'...in a suit to which it does not apply"). If an entity is a "person," as Will noted, the state has waived any immunity it might otherwise have had under the Eleventh Amendment. Harmonizing Monell and Will, we see that if an entity is a local governing body with specific discretionary powers and duties, it is not a true "arm of the state" and is not entitled to the state's Eleventh Amendment protections.

1. Martinez did not consider whether a local board is a "person" under §1983. In a case based upon a school board's alleged violation of an employee's First Amendment rights, the Tenth Circuit held that in New Mexico a local board of education is an "arm of the state" for Eleventh Amendment immunity purposes, and that the federal trial court correctly dismissed the board and its members sued in their official capacities from liability under the §1983 suit. Martinez, 748 F.2d at 1396. The court did not determine if a local board was a "person" under Monell. Martinez, cited to Article XII, Section 6 of the New Mexico Constitution as support for its

finding that the State Board of Education has pervasive control of all local boards. That Article provides that the State Board has "control, management and direction of all public schools, pursuant to authority and powers provided by law." N. M. Const. Art. X11, §6. We have previously concluded, however, that Section 6 is not self-executing, Amador v. New Mexico State Bd of Educ., 80 N.M. 336, 337, 455 P.2d 840, 841 (1969), and the State Board's control is limited to its statutory powers enumerated under NMSA 1978, Sections 22-2-1 and 22-2-2 (Repl. Pamp. 1993). The Legislature has given local boards exclusive power over employment and discharge of school employees. Section 22-5-4(D). Thus, the State Board does not have even supervisory control in that area. See Bourne v. Board of Educ., 46 N. M. 310, 315, 128 P.2d 733, 736 (1942).

Under the second prong of Mt. Healthy, the Martinez court also found that the State Board fully controls the fiscal-budgetary matters of all schools, that the taxing method for the schools is statewide, and that the funds from the state are

applied on a formula to equalize funding. Martinez, 748 F.2d at 1396. Because its focus was on the Eleventh Amendment, the court did not consider whether the state may have waived immunity by also giving its local school boards specific duties and powers such that they are local governing bodies. See Will, 491 U. S. at 68-69 n.7. The Tenth Circuit failed to consider the Monell principle that there is no "basis for concluding that the Eleventh Amendment is a bar to municipal [and by implication, local school board] liability," see 436 U. S. at 690 n. 54.

The Supreme Court in Howlett, 496 U. S. at 375, concluded that any decision holding that "governmental entities subject to §1983 liability enjoy an immunity over and above those already provided in §1983" would violate federal law. Id. at 375. It further stated that since the Supreme Court "has held that municipal corporations and similar governmental entities are 'persons'... a state court entertaining a §1983 action must adhere to that interpretation." Id. at 376 (citing Monell, Will, and Mt. Healthy). A court need not reexamine

whether a particular local school board is a "person" each time a different school district is sued unless there is a real question under state law of whether local school boards are political subdivisions. In California, for example, local boards are indivisible agencies of the state. Thus, in Belanger v. Madera Unified School District, 963 F.2d 248, 251 (9th Cir. 1992), cert. denied, 113 S. Ct. 1280 (1993), the court held that local California school boards were "arms of the state." It based this holding upon three factors: first, any judgment against a school district would be satisfied out of state funds; second, under California law, school districts are state agencies; and third, school districts perform central government functions. Id. In California, the state government even dictates when a student may be expelled. Id. at 253.

The Howlett Court stated that "by including municipalities within the class of 'persons' subject to liability for violations of the Federal Constitution and laws, Congress... abolished whatever vestige of the State's sovereign immunity the municipality possessed. Howlett, 496 U. S. at 376

(quoting Owen v. City of Independence, 445 U.S. 622, 647-48 (1980)). While Howlett focused on state sovereign immunity rather than Eleventh Amendment immunity, the implication of that statement is that Eleventh Amendment immunity also doe snot apply to a political subdivision in a §1983 action. See Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 813 (3rd Cir. 1991) (en banc) (stating that "political subdivisions are not 'State[s]' under the Eleventh Amendment"), cert denied, 112 S. Ct. 2281 (1992).

2. Martinez did not consider all of the Mt. Healthy factors. The Martinez court failed to fully consider some key aspects regarding a local school board's autonomy and also did not take all of the Mt. Healthy factors into consideration. As mentioned above, there are three factors to consider under Mt. Healthy: 1) what the state law calls the entity; 2) whether the entity has political and financial autonomy; and 3) whether the entity operates like a political subdivision.

a. Local school boards are statutorily defined as "local public bodies." The Martinez court did not examine the

first factor or acknowledge that in New Mexico, the term "state" or "state agency" is defined for purposes of governmental immunity as "the state of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions," NMSA 1978, §41-4-3(G) (Repl. Pamp. 1989), while a "local public body" is defined as "all political subdivisions of the state and their agencies, instrumentalities and institutions...." Section 41-4-3(C). Therefore, while the State School Board is a state agency, a local school board is a "local public body." This factor is crucial because, as stated above, in Will the Court acknowledged that when a state imposes a specific duty on a political subdivision, the state implicitly revokes immunity for suits involving that duty. 491 U.S. at 68-69 n.7. Further, under the New Mexico Constitution, a local school district is not designated as a state educational institution. See N. M. Const. art. XII, §11. Under the first Mt. Healthy factor, our local school boards are local governing bodies, not "arms of the state."

b. Local school boards have significant political and

financial autonomy. New Mexico local school boards have been given several exclusive powers with which to carry out their duty to locally "supervise and control all public schools within the school district and all property belonging to or in the possession of the school district." Section 22-5-4(A). For example, local boards may "contract, lease, purchase and sell for the school district," Section 22-5-4(G); and may "issue general obligation bonds of the school district," Section 22-5-4(K).

"A central concern in assessing the financial autonomy factor is whether an entity has the power to levy taxes and issue bonds, in order that a judgment may be payed without resort to the general revenues of the state." Board of Trustees v. Landry, 638 N.E.2d 1261, 1264 (Ind. Ct. App. 1994). The fact that our local school boards may issue bonds weighs heavily in favor of their autonomy and against their characterization as "arms of the state."

The Martinez court found that the State Board had pervasive financial control over all school districts because the

Public School Finance Act, NMSA 1978, §§22-8-1 to 42 (Repl. Pamp. 1993), provides that the State Board conduct budget-making with the local board. 748 F.2d at 1395. The court did not consider, however, that the local board determines priorities for spending and has discretion in spending funds generated under the Act as long as special needs programs are met. Section 22-8-17.

Critically, we note that under Section 22-19-16, no obligation issued by a local school board may be charged against or become a debt of the state or any of its political subdivisions. A local school board may also "adopt regulations pertaining to the administration of all [its] powers or duties." Section 22-5-4(O). Although the Martinez court opined that the state has "pervasive" control, management, and direction of public schools, this control is only in the form of guidance by regulation, not by actual physical control of the entities. As the Tenth Circuit stated, even broad supervisory power is "still 'supervisory' and not 'control.'" Unified Sch. Dist. No. 480 v. Epperson, 583 F.2d 1118, 1123 (10th Cir. 1978).

Finally, the New Mexico Constitution provides that judgments rendered against a city, county, school district, or board of education "shall be paid out of the proceeds of a tax levy as other liabilities...and when so collected shall be paid by the county treasurer to the judgment creditor." N.M. Const. art. VIII, §7. The Martinez court found NMSA 1978, Section 7-37-7(C)(3) (Repl. Pamp. 1993) to be the implementing statute for that provision and stated that the provision was limited to judgments arising from tort or contract actions. Martinez, 748 F.2d at 1395. The court determined that constitutional violations were not torts; thus a judgment arising from such a violation would not be paid out of such levies. Id. The court then concluded that because federal district courts had previously held that judgments for §1983 actions would be paid out of state funds, the boards were "arms of the state." We agree with the Tenth Circuit's later statement that "[t]he proper analysis focuses on whether the damage award would be paid directly by the state treasury, rather than indirectly through commingled state and local funds or state

indemnification provisions." Ambus v. Granite Bd. of Educ., 995 F.2d 992, 996 (10th Cir. 1993) (en banc).

Section 41-4-20 of the Tort Claims Act requires that all "local public bod[ies]... purchase insurance, establish reserves or provide a combination of insurance and reserves or provide insurance in any other manner authorized by law" for liabilities not covered under the Act. NMSA 1978, §41-4-20(A)(1)(c) (Repl. Pamp. 1989). The Martinez court noted this statute. Martinez, 748 F.2d at 1395, but focused only on the "reserves" aspect of that requirement. It concluded that if a board elected to establish reserves, the reserves would be funded with state funds. Once funding has been allocated to a local district, however, it becomes local district reserves and no longer is part of the state treasury.

We do not answer the question of whether Section 7-37-7(C)(3) applies to judgments arising from constitutional violations, but we note that whether it does or does not, Section 41-4-20 ensures that such liabilities will not be imposed upon the state treasury. See Garcia v. Board of Educ., 777

F.2d 1403, 1416 (10th Cir. 1985) (McKay, J., dissenting in part and concurring in part) (explaining why Section 7-37-7(C)(3), and Section 41-4-20 show that, generally, school district liabilities are not paid directly from state funds. Our local boards, like those described in Mt. Healthy, Epperson, and Landry, maintain significant managerial and fiscal autonomy.

c. Local school boards operate like other political subdivisions. WE further believe that in an "arm of the state" analysis for purposes of a §1983 action, the courts are to analyze the general nature of an entity. Local board members are elected by popular vote from residents of the counties or precincts that form the particular district. Section 22-5-1. The boards may "acquire and dispose of property," Section 22-5-4(H); and ALSO "have the capacity to sue and be sued," Section 22-5-4(I). We recognize that the sale of school district property valued at more than $5000 must be approved by the state department of public education, but we also note that other local public bodies (except for municipalities) must

also obtain approval for the sale of their property from the local government division of the department of finance and administration. NMSA 1978, §13-6-2 (Repl. Pamp. 1992). Significantly, the legislature defined "school districts" for the purposes of this statute as "those political subdivisions of the state established for the administration of public schools." Section 13-6-4(D) (emphasis added). Obviously, the requirement for state approval does not make a political subdivision an "arm of the state." School districts operate independently, like counties and municipalities.

Our analysis of the three Mt. Healthy factors leads to the conclusion that New Mexico school districts and their boards are political subdivisions and not "arms of the state." See Garcia, 777 F.2d at 1411-17 (McKay, J., dissenting) (stating that an application of all of the Mt. Healthy factors leads to the conclusion that New Mexico school boards are not "arms of the state"); cf. Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974) (stating that a county does not occupy the same Eleventh Amendment position as a state notwithstanding

that a county's actions are state action for purposes of the Fourteenth Amendment); Moor v. County of Alameda, 411 U.S. 693, 718-20 (1973) (holding that a county was a "citizen" for jurisdictional purposes because it was given corporate powers; was a body corporate and politic; could sue and be sued; was deemed to be a local public entity in contrast to the state and its agencies; could sell, hold, or deal in property; and could issue bonds that created no obligation on the part of the state); Landry, 638 N.E.2d at 1264-66 (determining that Indiana school districts are not "arms of the state" by using a similar analysis); Elder v. Highlands County Bd. of County Comm'rs, 497 So. 2d 1334, 1336 (Fla. Dist. Ct. App. 1986) (stating that a county's "effort to remove itself from Monell and the reach of section 1983 by claiming status as a subdivision of the state [and protection under Eleventh Amendment immunity] originates in a misunderstanding of the Supreme Court's comment that '[o]ur holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment

purposes,'" and holding that a county was not protected by the Eleventh Amendment).

3. Martinez is inconsistent with the majority of school board cases. The overwhelming majority of courts have held that local school boards are not "arms of the states." See Monell, 436 U.S. at 618 & n.5 (citing a dozen Supreme Court cases brought under §1983 in which the principal defendant was a school board); Ambus, 995 F.2d at 994-95 (listing ten cases in which courts have found no Eleventh Amendment immunity); Landry, 638 N.E. 2d at 1266 (holding that Indiana school districts are subject to suit under §1983). It seems that the Martinez opinion is an anomaly to Tenth Circuit application of the Mt. Healthy factors. In the Ambus opinion, the court noted that it had denied immunity to school districts in Kansas and Wyoming, assuming that Mt. Healthy had resolved the issue in the Wyoming case. 995 F.2d at 994. The Ambus court also found no Eleventh Amendment immunity for a local school board in Utah. Id. at 997. Utah, like New Mexico, characterizes its local boards as political subdivisions, Id. at

995; grants its State Board governing authority but not local authority, Id. at 996; funds its school districts with public funds, id; and requires its boards to obtain insurance against adverse judgments, id at 997. Because New Mexico's local school boards are so similar to those of Utah, Kansas, and Wyoming, we are hard-pressed to understand the different result arrived at in Martinez. We conclude that Martinez reached its conclusion because it neither recognized the Monell presumption nor considered all of the Mt. Healthy factors, and we decline to regard that case as persuasive authority.

We conclude that Martinez reached its conclusion because it neither recognized the Monell presumption nor considered all of the Mt. Healthy factors, and we decline to regard that case as persuasive authority.

We conclude that Monell requires that local school boards be considered "persons" for the purposes of §1983 unless they are in fact state agencies or "arms," and that under Howlett, a §1983 action against a political subdivision of the state is not barred in New Mexico by any statutory

governmental immunity. We find, under Mt. Healthy, that our local school boards are local governing bodies with political and fiscal autonomy. Our local school boards are indeed "persons" subject to liability under §1983. We therefore hold that the trial court improperly dismissed Daddow's §1983 action. This holding, however, does not mean that Daddow should have prevailed on the merits of her action.

II. Daddow received due process. The trial court alternatively ruled that if Daddow could have brought a §1983 action against the District alleging failure to extend due process, that claim would fail on its merits because the District fired Daddow for just cause (deficient job performance) and in a manner conforming with due process. The unchallenged findings and an examination of the record support this conclusion. See Wood v. Citizens Standard Life Ins. Co., 82 NM 271, 273, 480 P.2d 161, 163 (1971) (findings not directly attached are binding on this Court); Entertainment Corp. of Am. v. Halberg, 69 NM 104, 105, 364 P.2d 358, 359 (1961) (findings supported by substantial evidence will be sustained on

appeal). It is uncontroverted that the District offered Daddow a post-termination hearing, at which she declined to appear. The trial court also found that Daddow had opportunities prior to termination to address the allegations against her. When an employee who may be terminated only for just cause is fired, due process requires "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the story." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Daddow received due process.

III. The trial court properly interpreted NMSA 1978, Section 22-5-4(D) (Cum. Supp. 1992). At the meeting in which Daddow was terminated, the Carlsbad superintendent of schools recommended that Daddow's employment be continued instead of terminated. Section 22-5-4(D), which governs termination of school employees, states, in part:

> A local school board shall have the following powers or duties:...(D) subject to the provisions of law, approve or disapprove the ...termination or discharge of all employees...upon a recommendation of...termination or discharge by the superintendent of schools. Any

> ...termination or discharge without the prior recommendation of the superintendent is void....

Daddow interprets this statute to mean that a school board may not terminate an employee unless the superintendent positively recommends that termination. The Board, however, is the only entity with the power to terminate employees. Gallegos v. Los Lunas Consol. Sch. Bd. of Educ., 95 NM 160, 161-62, 619 P.2d 836, 837-38 (Ct. App.), cert quashed, 95 NM 299 (1980). "Recommendation refers to an action which is advisory in nature rather than one having any binding effect." Black's Law Dictionary 1272 (6th ed. 1990). We agree with the District that the purpose of this statute is to require input of a superintendent before a personnel decision is made, and not to render a board powerless to act except in accordance with the recommendation of its superintendent. Had the Legislature intended to give a superintendent the absolute power over hiring and termination, it could easily have required the superintendent's "approval" of the board's actions instead of requiring only a "recommendation".

IV. The trial court correctly awarded costs to the

District as the prevailing party. Under SCRA 1986, 1-054(E)(repl. Pamp. 1992), "costs shall be allowed as a matter of course to the prevailing party unless the court otherwise directs." A ruling on costs will not be disturbed absent a finding of abuse of discretion. Pioneer Sav. & Trust v. Rue, 109 N.M. 228, 231, 784 P.2d 415, 418 (1989). Although the trial court characterized its judgment as a dismissal of Daddow's complaint, because the dismissal was made after a full trial on the merits, it is treated as a judgment on the merits. Herbert v. Sandia Savs. & Loan Ass'n, 82 NM 656, 657, 486 P.2d 65, 66 (1971). The "prevailing party" is the one that wins the suit. South v. Lucero, 92 NM 798, 804, 595 P.2d 768, 774 (Ct. App.), cert denied, 92 N.M. 675, 593 P.2d 1078 (1979). The District won the suit and therefore was entitled to costs; Daddow presented no cogent argument explaining how the court abused its discretion in awarding them.

V. The District is not entitled to reimbursement from an employee of federal monies lost due to the negligence of

that employee. The District alleges error in the trial court's ruling that it could not recover damages resulting from Daddow's failure to comply with federal regulations. The court found that although Daddow was negligent in her job performance, the District was not entitled to recover that loss unless it could show that Daddow directly benefitted from her failures. The District presented its claim in terms of common-law negligence, but we see it as a request to hold an employee liable for indemnification.

It is the general rule that an employer may bring an action for negligence against its employee for "whatever...damage is occasioned by the employee's failure to exercise reasonable care and diligence." See 53 Am. Jur. 2d Master & Servant §108 (1970). We note, however, that the legislature has statutorily altered this rule for government employees. NMSA 1978, Section 41-4-17 (Repl. Pamp. 1989) provides that "a governmental entity... shall have no right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have

acted fraudulently or with actual intentional malice causing the ...property damage...resulting in the settlement or final judgment." While this provision may not directly address the District's claim, it does provide us with guidance in reviewing the trial court's decision. In light of the legislature's reluctance to require indemnity in the absence of fraud or intentional malice, and given the facts of this case, we find that the trial court properly exercised its equitable powers to bar recovery on a finding of only negligent behavior.

Daddow presented evidence that Daddow's supervisor, the Superintendent, believed that the losses the District suffered were not entirely Daddow's fault, and that she should not be terminated. Other evidence showed that Daddow was more than likely inept. An "employer's remedy is to fire the employee for ineptness or lack of diligence." Fried v. Aftec, Inc. 587 A.2d 290, 297 (N.J.Super. Ct. App. Div. 1991). Further, Daddow showed that the District was aware that she either was not capable of properly complying with the federal regulations or did not fully understand the process in 1988.

She also demonstrated that the District reprimanded her for her failures, yet took no steps to train her or to ensure compliance. "An employer cannot give an employee negative fitness reports, retain the employee, and later sue [that employee] for failure to perform the agreement or for overall negligence or carelessness, allegedly causing the company financial losses." Id. Finally, there are special considerations when the employer is a public employer. Ct. United States v. Gilman, 347 U.S. 507, 509-13 (1954) (holding that the federal government is not entitled to assert a common-law right of indemnity against an employee whose negligence has made the employer liable). We affirm the decision of the trial court.

VI. Conclusion. We reverse the decision of the trial court on the question of whether a §1983 action for money damages may be brought against a local school board and affirm the judgment of the trial court.

IT IS SO ORDERED.

GENE E. FRANCHINI, Justice

I CONCUR:

RICHARD E. RANSOM, Justice

JOSEPH F. BACA, Chief Justice (Joining In Justice Frost's Special Concurrence)

STANLEY F. FROST, Justice (Specially Concurring)

PAMELA B.MINZNER, Justice (Concurring in part and Dissenting in part)

FROST, Justice, specially concurring.

I specially concur with the majority opinion. I do so because I do not believe the opinion should address the issue of whether or not Daddow had a claim under 42 U.S.C. § 1983 (1988). The opinion holds that she was given due process with regard to her termination. A consideration and discussion of the applicability of § 1983 actions to school districts is therefore unnecessary. Resolution of this issue should await a proceeding wherein it must necessarily be decided after adequate briefing and possibly oral argument. I concur in parts II, III, IV, and V of the majority opinion and in the affirmance of the trial court's decision.

I. The Majority Unnecessarily Reinterprets U.S. Supreme Court Precedent.

The majority opinion is almost entirely devoted to an unnecessary examination of whether the term "person" as used in § 1983 includes local school boards.[2] In the first prong of

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[2]The relevant portions of § 1983 are set out in the majority opinion. See Majority Opinion at ____ (slip op. at 2).

its analysis under Part I, the majority reinterprets the U.S. Supreme Court cases that defined the scope of the term "person." The majority concludes that the analysis of what is a "person" under § 1983 is different from the analysis of what is deemed not to be an "arm of the state" for purposes of the Eleventh Amendment. The majority finds that the Supreme Court cases establish a "presumption" that a local school board is a "person" under § 1983 unless there is "conclusive evidence that [it] is legally only a state agency subject to a state's control." Majority Opinion at ____ (slip op. at 4). According to the majority, this evaluation of the status of a school board does not require a determination of the board's status under the Eleventh Amendment although Eleventh Amendment considerations provide some guidance. Id.

However, a straightforward analysis of the relevant cases defining "person" suggests otherwise. Contrary to the majority's conclusion, the relevant Supreme Court cases hold that the status of a local school board under § 1983 is conclusively determined by its status under an Eleventh

Amendment "arm of the state" analysis. Unfortunately, the majority's unique interpretation of the scope of the term "person" under § 1983, which is unnecessary for the holding of the opinion, places us in direct conflict with the U.S. Supreme Court's holdings and fails to follow the standard approach to § 1983 claims.

A. Monell Applies to Local Governing Bodies that are not Arms of the State.

In Monell v. Department of Social Services, 436 U.S. 658, 662 (1978), the U.S. Supreme Court addressed the question of whether the New York City board of education was a "person" within the meaning of § 1983. After analyzing the statutory history of § 1983, the Court concluded that local governing bodies were "persons" under § 1983 and, accordingly, could be sued. Id. at 690. However, the Court explicitly limited the reach of its holding, noting, "Our holding today is, of course, limited to local government units which are not considered part of the State for Eleventh Amendment purposes." Id. at 690 n.54; see also id. at 690 n.55 (limiting its analysis to actions "where Eleventh Amendment

considerations do not control [the] analysis"); id. at 695 ("[W]e have no occasion to address, and do not address, what the full contours of municipal liability under § 1983 may be.") In fact, even though this case was initiated in federal court, and would ordinarily require an Eleventh Amendment immunity analysis, the Court did not consider whether the local school board was entitled to immunity from suit under the Eleventh Amendment. Instead, the Court operated under the presumption that it lacked immunity. Id. at 690 n.54.

B. Will Applies to Local Governing Bodies that are Arms of the State.

The U.S. Supreme Court next addressed whether the term "person" included the states in Will v. Michigan Department of State Police, 491 U.S. 58 (1989). The Court concluded that the term "person" did not encompass the states, primarily based on Eleventh Amendment considerations. Id. at 66-67. The Court noted that the Eleventh Amendment granted the states immunity from suit in federal court, and that Congress would not have intended to revoke this constitutionally granted immunity unless it expressly exercised

its power to do so under the Fourteenth Amendment. Id. at 66. Accordingly, it concluded that the definition of "person" did not include the states, so as to conform with the principles of the Eleventh Amendment.

However, the § 1983 suit at issue in Will was originally brought in state court where the Eleventh Amendment did not apply. Id. at 60. The Court concluded that Congress did not intend for § 1983, a remedial federal statute, to create a cause of action against a state in state courts while denying a parallel cause of action in federal courts. Id. at 66. Accordingly, the Court held that although the Eleventh Amendment did not apply in state courts, the Eleventh Amendment considerations that limit the definition of "person" in federal courts also apply to limit the definition of "person" in state courts. Id. Indeed, once the Court held that Eleventh Amendment considerations inform the statutory definition of "person" in federal cases, its application of Eleventh Amendment considerations in state court § 1983 claims was logically necessary to prevent the term "person" from having different meanings in state and federal

court.

Furthermore, the Will Court concluded that the immunity that states enjoyed under § 1983 also extended to state officials sued in their official capacity. Id. at 71. This conclusion was a logical extension of the limitation on § 1983 suits against states. A party should not be able to indirectly accomplish what it could not do directly, namely, force the state to pay a § 1983 judgment brought against a state official. See Kentucky v. Graham, 473 U.S. 159, 166-70 (1985) (overturning a § 1983 damages award against a state official acting in his official capacity in which the state was forced to pay the judgment). The Will Court also extended its analysis to governmental bodies that are arms of the state, as defined by the Eleventh Amendment, for the same reason. Will, 491 U.S. at 57. Therefore, a straightforward reading of Will indicates that in order to determine whether a governmental body is a "person" under § 1983, we must consider whether the body is an arm of the state for Eleventh Amendment purposes.

C. The Majority Misinterprets the Will and Monell Cases

and Needlessly Complicates the § 11983 Analysis.

The majority opinion, however, finds a conflict between Will and Monell where none exists. It points to language in Will where the Court noted that the scope of § 1983 and the scope of the Eleventh Amendment are separate issues. Majority Opinion at ____ (slip op. at 5). The majority opinion also points to the fact that Will did not overrule Monell's holding that a local school board was a "person" under § 1983. The majority then attempts to "harmonize" Will and Monell by redefining the term "arm of the state" used in Will to mean an entity that is not "a local governing body with specific discretionary powers and duties." Majority Opinion at ____ (slip op. at 6-7). Thus, the majority opinion concludes that Monell controls the present case, and holds that local boards are presumed to be "persons" under § 1983 as distinct from the question of whether they are arms of the state under the Eleventh Amendment.

However, the Court in Will noted that the holding in Monell was expressly limited to governing bodies that were not

arms of the state for Eleventh Amendment purposes, and held that the rule established in Will applied to governmental entities that were arms of the state under the Eleventh Amendment. Will, 491 U.S. at 70. Accordingly, the two cases do not conflict. Under Monell, governing bodies that are not arms of the state are "persons" under § 1983, and under Will, states, state actors sued in their official capacity, and arms of the state are not "persons" under § 1983. As for the language cited by the majority, the statements about the difference in scope of § 1983 and the Eleventh Amendment did not negate the fact that Eleventh Amendment considerations served as the primary basis for the Court's interpretation of the term "person". Id. at 66-67. In addition, this statement could just as easily be interpreted as an acknowledgement that § 1983 and the Eleventh Amendment have different applications; § 1983 applies in all forums, whereas the Eleventh Amendment only applies in federal courts, and Eleventh Amendment immunity may be waived by the states, whereas § 1983's immunity is definitional, and may not be waived.

The majority opinion also appears to suggest that not only is the examination of whether a local board is a "person" under § 1983 different from that conducted under the Eleventh Amendment, but that the § 1983 analysis will affect the board's immunity under the Eleventh Amendment. It notes that if the local board is not a "true 'arm of the state'" under the Monell § 1983 analysis, it "is not entitled to the state's Eleventh Amendment protections." Majority Opinion at ____ (slip op. at 7). The majority then notes that Martinez failed to consider whether a local board was a "person" under § 1983 before examining whether it was immune from suit in federal court under the Eleventh Amendment.

This argument, however, stands the traditional approach to the Eleventh Amendment on its head. The Eleventh Amendment presents a jurisdictional question of whether the federal court is a proper forum to hear a claim against a particular defendant. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 n.8 (1984). If the defendant is an arm of the state, the federal courts lack jurisdiction to hear the

claim. Since the Will Court explicitly noted that Congress did not intend to revoke or alter a state's Eleventh Amendment immunity by enacting § 1983, Will, 491 U.S. at 66, there was no reason for the Martinez Court to consider a school board's status under § 1983 in determining whether it was immune from suit in federal court. In suggesting otherwise, the majority substitutes its own unique interpretation of the interplay of the Eleventh Amendment and § 1983 which is contrary to the clear dictates of the Supreme Court.

D. The Howlett Case Supports the Straightforward Approach to § 1983 Using an Eleventh Amendment Analysis.

Fortunately, the U.S. Supreme Court removed any lingering doubt over the proper interpretation of the Will decision in Howlett v. Rose, 496 U.S. 356, 365 (1990). In Howlett, the Court explicitly stated, "As we held last Term in [Will], an entity with Eleventh Amendment immunity is not a 'person' within the meaning of § 1983." The Court continued, "Will establishes that the State and arms of the State, which

have traditionally enjoyed Eleventh Amendment immunity, are not subject to suit under § 1983 in either federal court or state court." Id. (emphasis added). Thus, the Supreme Court has made it abundantly clear that the term "person" does not include arms of the state and that the first step in determining whether a governmental entity may be sued under § 1983 is to examine whether it is an arm of the state under an Eleventh Amendment analysis, as set out in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977).

The majority suggests, that the Howlett opinion implies that Eleventh Amendment immunity "does not apply to a political subdivision in a § 1983 action." Majority Opinion at ____ (slip op. at 9). Thus, the majority seems to be arguing that § 1983 automatically revoked any Eleventh Amendment immunity for "political subdivisions" regardless of their status as arms of the state as determined under Mt. Healthy.

However, the § 1983 claim in Howlett was initiated in state court and therefore did not raise any Eleventh

Amendment issue, nor did the Supreme Court even address the Eleventh Amendment in Howlett. What the Supreme Court did do in Howlett, however, was expressly reaffirm its holding in Will which directly contradicts the majority's suggestion that the Eleventh Amendment does not always apply in § 1983 cases. In addition, the Howlett Court explicitly noted that the reason it was not addressing the question of whether the school board was an arm of the state for § 1983 purposes was because respondents did not raise that issue in its brief in opposition to the petition for certiorari. Howlett, 496 U.S. at 381 n.24. Therefore, the Court did not need to analyze whether or not the local school board fell within the class of governmental bodies found to be arms of the state under the Eleventh Amendment, and instead, simply assumed that the board was a "person" for § 1983 purposes because it had waived its immunity argument.

Unfortunately, the majority's interpretation of the Monell, Will, and Howlett opinions, addresses an issue which need not have been reached by this Court, sets us squarely at

odds with the clear intent of the Supreme Court as well as the interpretation adopted by state courts that have considered the issue. See e.g., Town of Lake Clarke Shores v. Page, 569 So. 2d 1256, 1257 (Fla. 1990) (noting that Will requires a municipality not to be an arm of the state as defined by Mt. Healthy); Livingood v. Meece, 477 N.W. 2d 183, 190 (N.D. 1991) ("It is now settled that neither a state, an entity with eleventh amendment immunity, nor a state official sued in his or her official capacity, is a 'person' within the meaning of § 1983...."); Williams v. State, 589 A.2d 840, 844 (Vt. 1990) (noting that arms of the state with Eleventh Amendment immunity are not "persons" under § 1983); Board of Trustees v. Landry, 638 N.E. 2d 1261, 1264 (Ind. Ct. App. 1994) (applying Eleventh Amendment analysis to determine immunity under § 1983); National Camera, Inc. v. Sanchez, 832 P.2d 960, 960 (Colo. Ct. App. 1991) ("[S]tates and arms of the state, which have traditionally enjoyed Eleventh Amendment immunity, are not 'persons' within the meaning of § 1983."); C.J. v. Vuinovich, 599 A.2d 548, 553 (N.J. Super. Ct. App.

Div. 1991) (same idea). Accordingly, because the first prong of the majority opinion is unnecessary to our holding in this case and places us squarely against the U.S. Supreme Court's interpretation as well as that of our sister states. I strongly believe we should not have addressed the issue of the scope and interpretation of Monell and Will.

II. The Majority Unnecessary Reexamines Local School Boards' "Arm of the State" Status.

In the second prong of its § 1983 analysis (Part I.D.2) the majority reexamines whether New Mexico's local school boards are in fact arms of the state as defined by Mt. Healthy. This question, however, has already been addressed by the Tenth Circuit in Martinez v. Board of Education, 748 F.2d 1393, 1396 (10th Cir. 1984), and answered in the affirmative. See also Garcia v. Board of Educ., 777 F.2d 1403, 1407 (10th Cir. 1985) (following Martinez). The majority opinion criticizes Martinez for misapplying the Mt. Healthy factors and conducts its own analysis of the federal statute, reaching the opposite conclusion.

Once again, this question about the status of local

school boards under the Eleventh Amendment need not have been addressed by this Court in reaching its conclusion. However, in conducting its own analysis, the majority unnecessarily places us in conflict with the Tenth Circuit and raises the possibility that a federal claim could successfully be brought in state court which would otherwise fail in federal court.

Furthermore, the recent opinion, Ambus v. Granite Board of Education, 995 F.2d 992, 994 (10th Cir. 1993) (overruling prior opinion holding Utah school board was an arm of the state), indicates that the Tenth Circuit may be rethinking its previous analysis of the Mt. Healthy factors. Compare id. with Martinez, 748 F.2d at 1396 and Garcia, 777 F.2d at 1411 (McKay, J., dissenting). Accordingly, until the question of the proper application of § 1983, a federal statute, is squarely before us, we should allow the Tenth Circuit to resolve the issues addressed by the majority.

III. Conclusion.

As the majority correctly points out in the second part

of its opinion, Daddow in fact received due process. The trial court found that the District offered Daddow a post-termination hearing, as well as opportunities to address the allegations prior to termination. These findings were not challenged on appeal. Since it is uncontroverted that there was no constitutional violation to serve as the basis for a § 1983 claim, we need not decide whether Daddow could have brought a § 1983 action against the school district had there been a constitutional violation.

Given the complexity of the issues involved, the limited briefing of those issues, and the potential conflicts created by the majority's approach, I believe this court should not have reached the issue of interpreting § 1983. This issue is best left for a future proceeding in which it must necessarily be decided and where the Court has the benefit of thorough briefing and argumentation. The fact that the majority failed to follow the straightforward approach set out by the U.S. Supreme Court in Will is indicative of the dangers in reaching issues not necessary for the opinion. Accordingly, I concur only in parts

II, III, IV, and V, and in the affirmance of the trial court's decision.

STANLEY F. FROST, Justice

I CONCUR:

JOSEPH F. BACA, Chief Justice

MINZNER, Justice (concurring in part and dissenting in part).

I concur in part and dissent in part. I join Part I of the majority opinion; I agree that school boards and their members acting in their official capacities are "persons" for purpose of actions based on 42 U.S.C. § 1983 (1988), and that a New Mexico school district is not an arm of the State for purposes of § 1983. I also agree that the Carlsbad Municipal School District and the Carlsbad Municipal board of Education ("the District") did not violate Catherine Daddow's federal constitutional right to due process. Thus, I join the majority's conclusion in Part II that the district court properly granted the District's motion for summary judgment on Daddow's § 1983 claim. I respectfully dissent, however, on the remaining issues, because I am not persuaded that NMSA 1978, Section 22-5-4 (Rep. Pamp. 1993), permits a school board to discharge an employee without the prior recommendation of the superintendent. In my view, the District terminated Daddow contrary to Section 22-5-4, and thus the District breached the employment contract into which they had entered. In addition

I would hold that the district court erred in granting summary judgment in Daddow's favor on the District's counterclaim for negligence. Therefore, I would remand the case to the district court for trial on both Daddow's contract claim and the District's counterclaim. In light of these conclusions, I would vacate the award of costs. My reasoning follows:

A. Whether Daddow's Discharge Complied with Section 22-5-4

I am unable to agree with Part III of the majority opinion, which affirms the district court's construction of Section 22-5-4(D). Under the district court's construction, the District properly discharged Daddow, notwithstanding the school superintendent's contrary recommendation. I respectfully suggest that the wording the legislature chose indicates it intended a different result. The legislature seems to me to have allocated the decision-making authority on this issue equally between the superintendent and the school board.

Section 22-5-4(D) states, in relevant part:

> A local school board shall have the following power or duties:...(D) subject to the provisions of law, approve or disapprove the...termination

> or discharge of all employees...upon a recommendation of...termination or discharge by the superintendent of schools...Any...termination or discharge without the prior recommendation of the superintendent is void[.]

The majority opinion agrees with the District that the statute requires a superintendent's input, but does not render a school board powerless to act, except in accordance with the recommendation of its superintendent. Slip op. at 16. However, the statue authorizes a school board to "approve...[the termination] upon a recommendation...of termination...by the superintendent" and then provides that a termination without the prior recommendation of the superintendent is void. I believe that the legislature intended the last sentence of the section to mean "[a]an...termination or discharge without the prior recommendation of [termination or discharge by] the superintendent is void." I note that Section 22-5-4(D) was amended in 1993 to say that "any employment relationship shall continue until final decision of the board." See 1993 N.M. Laws, ch. 226, 12. Although the amendment is not applicable to the facts of this case, Daddow having been

terminated prior to its effective date, it is consistent with the statutory construction I suggest is more appropriate: that the legislature contemplated the board would approve or disapprove a recommendation to terminate and did not authorize the board to discharge without such a recommendation.

There is some support for that construction in a 1980 opinion by Judge Andrews for the Court of Appeals. See Gallegos v. Los Lunas Consol. Sch. Bd. of Educ., 95 N.M. 160, 162, 619 P.2d 836, 838 (Ct. App.) (discussing the 1979 amendment to Section 22-5-4(D), which added the last sentence of the statutory provision, and agreeing with board's position in that case, which was that the legislature intended to strengthen the superintendent's power), cert. quashed, 95 N.M. 299, 621 P.2d 516 (1980). Cases from other states with statutes similar to ours also support the construction I suggest. See Adkins v. Board of Educ. of Magoffin County, 982 F.2d 952, 959 (1993) (under state law, school board "could not hire classified personnel without a recommendation from the

Superintendent"); State ex rel. Farley v. Board of Educ. of Euclid City Sch. Dist., 156 N.E.2d 924, 927-28 (Ohio 1958) (holding that "there can be no employment of a teacher...without a recommendation by the superintendent to that effect made to the board"). aff'd. 159 N.E.2d 747 (1959); Reed v. Greene, 243 S.W.2d 892, 893 (Ky. 1951) (holding that the "recommendation of the superintendent is a condition precedent to the right of the board to employ").

I do not disagree with the reasoning of Stanley v. Raton Board of Education, 117 N.M. 717, 976 P2. 232 (1994), which held that a school board may unilaterally discharge a superintendent without the superintendent's prior recommendation. As the Stanley opinion points out, it would be absurd to expect a superintendent to recommend his own removal. Id. at 719, 876 P.2d at 234. I am not persuaded, however, that requiring the superintendent's recommendation before a school board may discharge other employees serves no useful purpose. Rather, I believe the requirement provides additional protection for employees and strengthens a

superintendent's administrative authority, reasonable choices we may presume the legislature made after due consideration of the alternatives. Thus, I would limit Stanley to those situations where the school board is attempting to discharge a superintendent.

B. Daddow's Contract Claim

Following Daddow's presentation of her case, the district court directed a verdict in the District's favor after concluding that "[t]he School District did not breach its employment contract with Plaintiff by wrongfully terminating her.: In my view, this was an erroneous conclusion to law.

By its terms, the employment contract between Daddow and the District incorporated the termination procedures set forth in the Public School Code. The contract language mandates that any termination must comply with statutory procedures, even when there is good cause for termination.

> This contract may be canceled by the board for cause, including unsatisfactory work performance, incompetency, insubordination, physical or mental inability to perform the required duties or for any other good and just cause, provided, that any such cancellation may

> be effected only in accordance with the New Mexico Statutes and any applicable rules and regulations of the State and Local boards of Education.

This provision mandates that any termination must comport with the requirements of Section 22-5-4. Because the termination did not comport with that statute, the District improperly terminated her, and thus breached the foregoing provision of her contract. Whether Daddow was incompetent or insubordinate does not change the fact that the District failed to follow a procedure to which it had consented. I would reverse the directed verdict and remand for trial on the contract claim.

C. Whether Daddow's Illegal Discharge Gives Rise to a § 1983 Claim

As set forth above, I believe that the District failed to comply with the requirements of Section 22-5-4(D). Notwithstanding that conclusion, I agree with Part II of the majority opinion that the district court properly granted summary judgment in favor of the District on the § 1983 claim. Even if the District's termination of Daddow without

the prior recommendation of the superintendent did constitute an illegal deprivation of a valid property interest, Daddow is not entitled to relief un 42 U.S.C. § 1983.

In evaluated a procedural due process challenge to a deprivation of property, a court "examine[s] the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law." Zinermon v. Burch, 494 U.S. 113, 126 (1990). When a governmental entity terminates a public employee, predeprivation procedural due process normally requires notice and an opportunity for a meaningful hearing. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985). The record indicates that the District provided these safeguards to Daddow, and she does not challenge their adequacy on appeal. Moreover, under state law, Daddow had the right to challenge her termination in a postdeprivation common law contract suit, see NMSA 1978, 37-1-23 (Repl. Pamp. 1990), and she availed herself of the right.

Daddow's § 1983 claim does not challenge the adequacy of either the predeprivation safeguards or the postdeprivation state law remedies; rather, she asserts that because the District violated state law, it violated her constitutional rights. However, "[v]iolation of state law does not it itself create liability under Section 1983." Garcia v. Las Vegas Medical Ctr., 112 N.M. 441, 443, 816 P.2d 510, 512 (Ct. App.), cert. denied, 112 N. M. 308, 815 P.2d 161 (1991).

In Parratt v. Taylor, 451 U.S. 527 (1981), overruled on other grounds, Daniels v. Williams, 474 U.S. 327 (1986), the United States Supreme Court indicated that procedural due process requirements may be satisfied by an adequate postdeprivation remedy; the Court held that random and unauthorized negligent conduct resulting in deprivation of property did not give rise to a § 1983 claim because an adequate state remedy existed. Id. at 541-43; see also I Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation § 3.09 (3d ed. 1991 & 1993 Cum. Supp.). In reaching its decision the Court reasoned that the Fourteenth

Amendment was not intended to be a "'font of tort law to be superimposed upon whatever systems may already be administered by the States.'" Parratt, 451 U.S. at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976). Underlying the Prratt decision were considerations of federalism and the concern that federal constitutional law would subsume all other forms of existing tort law. See Michael Wells & Thomas A. Eaton, Substantive Due Process and the Scope of Constitutional Torts, 18 Ga. L. Rev. 201, 208-212 (1984). Parratt and its progeny support a conclusion that Daddow's § 1983 claim lacks merit, regardless of whether the District violated Section 22-5-4 when it terminated her, absent a showing that state remedies or procedures are inadequate. See Clifton v. Schafer, 969 F.2d 278, 281 (7th Cir. 1992); Costello v. Town of Firfield, 811 F.2d 782 (2d Cir. 1987). See generally I Nahmod, supra, § 3.17.

D. The School Boards' Counterclaim for Negligence

I also am not persuaded that the district court properly dismissed the District's counterclaim against Daddow for

negligence, and I therefore respectfully dissent from Part V of the majority opinion. See ____N.M. at ___,___P.2d at___)slip op. at 17-18). The district court determined that the School Board's negligence claim would not lie because there was no allegation that Daddow had personally profited from her malfeasance. The requirement of personal profit is not an element of a negligence claim. See generally W. Page Deeton et al., Prosser and Keeton on Torts § 30 (5th ed. 1984). Indeed, such a requirement would seem to be consistent with an intentional tort rather than one based upon negligence. Moreover, while Daddow defends the correctness of the dismissal, her brief to this Court cites no authority to support the proposition that, under these circumstances, a negligence claim requires a showing of personal profit.

I agree with the majority that the circumstances under which an employer can maintain a negligence action against an employee are limited. Nonetheless, I think that the facts of this case may give rise to such a claim. According to the Restatement of Agency,

> The negligence for which an agent is subject to liability to the principal may consist of misconduct in negotiations with third persons, of conduct causing harm to the principal's tangible things in his custody, or of conduct causing the principal to be subject to liability for a tort, crime, or breach of contract. If the agent receives compensation he is subject to liability in an action of contract or of tort...

Restatement (Second) of Agency § 379, at 178 cmt. b (1958) (emphasis added). The School District's counterclaim specifically alleged that Daddow's negligence resulted in a $60,000 liability to the Department of Agriculture. Presumably, this liability arose out of the school district's breach of its contractual obligations.

United States v. Gilman, 347 U.S. 507 (1954), is distinguishable. In Gilman, a plaintiff who was injured as a result of Gilman's negligence brought a personal injury claim against the federal government pursuant to the federal Tort Claims Act. After the plaintiff recovered against the government, the government in turn brought a third-party claim against Gilman under a common law theory of indemnification, and the appeal ensured. Id. at 508. Noting that Congress had

been silent on the issue of indemnification, the United States Supreme Court weighed the public policy concerns and determined that a right of indemnification was not embodied in the federal Tort Claims Act. Id. at 509-13.

Unlike Congress, however, our legislature has spoken on the issue of indemnification in the New Mexico Tort Claims Act, NMSA 1978, § 41-4-17(A) (Repl. Pamp. 1989), which provides:

> A. The Tort Claims Act [41-4-1 to 41-4-27 NMSA 1978] shall be the exclusive remedy against a governmental entity or public employee for any tort for which immunity has been waived under the Tort Claims Act and no other claim, civil action or proceeding for damages, by reason of the same occurrence, may be brought against a government entity or against the public employee or his estate whose act or omission gave rise to the suit or claim. No rights of a governmental entity to contribution indemnity or subrogation shall be impaired by this section, except a governmental entity or any insurer of a governmental entity shall have not right to contribution, indemnity or subrogation against a public employee unless the public employee has been found to have acted fraudulently or with actual intentional malice causing the bodily injury, wrongful death, property damage or violation of right, privileges or immunities secured by the constitution and laws of the United States or

> laws of New Mexico resulting in the settlement or final judgment. Nothing in this section shall be construed to prohibit any proceedings for mandamus, prohibition, habeas corpus, certiorari, injunction or quo warranto.

This statue makes available that which the Gilman Court lacked--legislative action suggesting general public policy. In view of the legislature's action, I am not satisfied that Daddow was entitled to judgment as a matter of law on the underlying facts. See SACRA 1986, 1-054(C) (Repl. Pamp. 1992).

The district court dismissed the counterclaim after it granted the District a directed verdict on Daddow's contract claim. By then Daddow had put on her case-in-chief, but the District had not put on its defense or its case-in-chief on the counterclaim. Dismissal of the counterclaim under these circumstances probably constituted a grant of summary judgment in Daddow's favor. Cf. Santistevan v. Centinel Bank of Taos, 96 N.M. 734, 735, 634 P.2d 1286, 1287 (Ct. App. 1980) (holding that a motion for dismissal for failure to state a claim may be treated as a motion for summary judgment if matters outside the pleading are considered by the court), aff'd

in part, rev'd in part, 96 N.M. 730, 734 P.2d 1282 (1981). In light of the procedural posture of this case at the time the District's counterclaim was dismissed, I am concerned that a decision to affirm is premature. We cannot determine on this record whether the District can support its allegations of negligence and, if so, what degree of negligence they would be able to prove. We also cannot determine on this record whether Daddow's negligence caused the District any harm. Indulging all reasonable inferences in favor of the District, I would conclude that summary judgment on the counterclaim was improper and remand for trial. Under these circumstances, I believe we run the risk of hampering the future development of the law governing an appropriate recovery of public funds in analogous cases, even if on these facts the ultimate resolution would be adverse to the District's position.

E. Conclusion

For the reasons, I would affirm the district court's decision granting the District summary judgment on Daddow's

§ 1983 claim, reverse the court's decision directing a verdict for the District on her contract claim and the decision dismissing the District's counterclaim, and remand for trial; I would vacate the award of costs to the District as premature. Although I agree with the analysis of the District's status under § 1983 and join Parts I and II of the majority decision, I respectfully dissent from those portions of the majority opinion affirming the district court's resolution of Daddow's contract claim and the District's counterclaim, and thus do not join Parts III, IV, and V of the majority opinion.

PAMELA B. MINZNER, Justice

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY

CATHERINE DADDOW,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV-90-191-W
	)	Filed Jan. 29, 1993
CARLSBAD MUNICIPAL	)	
SCHOOL DISTRICT, et al,	)	
	)	
Defendants.	)	

DECISION

THIS MATTER came on for hearing on August 18, 1992, Plaintiff appearing in person and by her attorney, Benny R. Naranjo, Esq., and Defendant's appeared by Jeffrey B. Diamond, President of the Carlsbad School Board, and by Defendants' counsel, Michael Newell, Esq., and the Court heard Plaintiff's evidence until the afternoon of August 21, 1992, at which time hearing was adjourned until a later date. Thereafter, hearing was resumed, same parties and counsel appearing on January 4, 1993, with Plaintiff resting her case on January 6, 1993, at which point Defendant moved for

Judgment dismissing Plaintiff's Complaint, and the Court granted said Motion, allowing the parties to file Requested Findings of Fact and Conclusions of Law, which the Court has now considered. The Court hereby enters this Decision as its formal Findings of Fact and Conclusions of Law, all requested Findings and Conclusions in conflict with those made hereinafter being refused and denied.

FINDINGS OF FACT

1. The Plaintiff, Catherine Daddow, a resident at all times material hereto of Carlsbad, Eddy County, New Mexico, brought suit against the School District and the School Board in its official capacity asserting claims grounded in breach of employment contract between Daddow and the School District.

2. Plaintiff was employed by the School District from June, 1985, until her termination on July 11, 1989, as School Food Services Director, an uncertified position not eligible for statutory rights afforded certified school administrators.

3. Plaintiff was responsible for maintaining proper inventory controls and for compliance with State and Federal regulations as Food Services Director as reflected in Defendant's Exhibits 8 and 9, job descriptions for her position.

4. Plaintiff failed to comply with a basic and long standing Federal regulation requiring that meals be priced as a unit before eligibility for reimbursement attaches, resulting in an audit exception and a requirement that a substantial sum (in excess of $60,000.00) be repaid to the Federal Government by the School District.

5. In September, 1988, the New Mexico Department of Human Services conducted an audit of the School District's Cafeteria Department, wherein there was found to be a wide-spread misuse of commodities, inadequate inventory controls, missing or otherwise unaccounted for foodstuffs, including hams, turkeys and other items as reflected in Defendant's Exhibit 89, report from John Colella on the Human Services Department's 1988 audit.

6. Plaintiff received a letter of reprimand dated

October 28, 1988, (Defendant's Exhibit 2) citing deficiencies in her work performance, specifically including failure to maintain proper perpetual inventory records, and other deficiencies as well. Plaintiff had approximately eight and one-half (8 1/2) months to correct the specified deficiencies, during the period from reprimand to termination.

7. Inventory requirements for participation in the Federal Commodities Program are for the protection of the United States, the taxpaying public and the School District. Plaintiff's failure to maintain a proper perpetual inventory constituted a serious deficiency in Plaintiff's job performance, and was a cause for her termination.

8. Subsequent to the October 28, 1988, letter of reprimand, the School District's Cafeteria Department was audited by the Office of the Inspector General of the United States Department of Agriculture as reflected by Defendant's Exhibit 97, OIG Audit Report No. 27023-253-TE. Among other findings, the audit found that as late as May, 1989, proper inventory controls were not in pace in the School

District's Cafeteria Department. It additionally confirmed the findings of Misuse of Commodities and also ordered the School District to pay the Department of Agriculture and amount ultimately negotiated down by the School District to a sum in excess of $60,000.00, as a result of overclaims on reimbursable meals and commodities, which amount the School District has paid.

9. In May, 1989, a telephone conference was held with Plaintiff, local school administrators, the local school board president, State Education Department officials and the auditor who performed the audit for the Inspector General's office of the United States Department of Agriculture, as reflected by Plaintiff's Exhibit 39, a transcript of said conference. During this telephone conference, the various findings were presented to Plaintiff wherein she had the opportunity and did in fact respond to the problems identified by the auditor. Plaintiff's responses did not indicate correction of problems.

10. Despite the reprimand and audit exceptions,

Plaintiff steadfastly refused to accept the significance of maintaining an accurate and up-to-date perpetual inventory, and indicated, even in her testimony before this Court, that she considered the inventory requirement to be an unnecessary nuisance.

11. Plaintiff failed to meet the requirements of her job description.

12. In May, 1989, Plaintiff was well aware of claims of mismanagement of the School Food Services, and she tendered her resignation to the School District's Administration. This resignation was withdrawn without being made known to or presented to the School Board.

13. Plaintiff received notice that she was on the agenda for the June 20, 1989, School Board Meeting. Plaintiff appeared with her attorney, Mr. Benny Naranjo and spoke following allegations presented by School Board President, Jeff Diamond. The meeting was recorded on tape and Plaintiff's behavior at the June 20, 1989, School board Meeting can only be characterized as insubordinate. She addressed the School

Board in a loud, disrespectful and angry manner, stating that she did not care if the board took action to terminate her employment and comparing the Board to the government of Beijing, China. A transcript of the tape of said meeting is in evidence as Defendant's Exhibit 81.

14. Although Plaintiff was terminated for deficient job performance and not for insubordination, Plaintiff's attitude at the School Board Meeting of June 20, 1989, is fairly typical of a problem facing the Board which continued to manifest itself in her testimony on cross examination before the Court. When confronted with audit exceptions and other evidences of mismanagement, Plaintiff tended to belittle requirements not met, or place blame on others, rather than discussing problems and solutions in a constructive way.

15. The Carlsbad Municipal School Board terminated Plaintiff at the next School Board meeting on July 11, 1989. The School board voted three to two in favor of discharge by reason of uncorrected unsatisfactory work performance. The discharge was preceded by a

recommendation from Roger Harrell, Carlsbad School Superintendent, who recommended that Plaintiff be retained.

16. School District Policy 4116 applies to non-certified employees of Carlsbad Public Schools, but it cannot have been intended to apply to supervisory personnel holding contracts.

17. Although the Carlsbad Municipal School system did not have in place specific personnel policies to address termination procedures for non-licensed supervisory personnel, Plaintiff was offered the opportunity of a post-termination hearing, which she declined.

18. Plaintiff was offered apportunities [SIC], prior to and subsequent to termination, to address the allegations against her. At the June 20, 1898, School Board Meeting, Plaintiff made a speech, but did not constructively address the Board's concerns. Subsequent to termination, Plaintiff was offered a hearing which she refused.

19. Plaintiff was negligent in performing her duties as Director of Food Services, and her negligence made it

impossible to adequately account for food stuffs and also required protracted negotiations between the School District and the Federal Government, and, ultimately, required the School Board to repay in excess of $60,000.00 to the Federal Government.

20. The Carlsbad School District had just cause to terminate Plaintiff for substantial deficiencies in her job performance.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter.

2. During Plaintiff's case, evidence was adduced and admitted concerning Plaintiff's deficient work performance as cause for her termination, and the pleadings should be deemed amended to the extent necessary to conform to the evidence, as moved by Defendants.

3. The School District did not breach its employment contract with Plaintiff by wrongfully terminating her. She was terminated for uncorrected unsatisfactory work

performed.

4. No claim against the School District and School Board under 42 U.S.C. Sec. 1983 is available to Plaintiff, under Will v. Michigan Department of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed. 45 (1989) and Martinez v. Board of Education of Taos Municipal School District, 748 F.2d. 1393 (10th Cir. 1984). However, if Plaintiff could state a claim involving Federal due process statutes, the Court would hold Plaintiff was afforded all process required.

5. The School District is entitled to Judgment dismissing Plaintiff's Complaint with prejudice.

Defendant's counsel is requested to prepare a Judgment in accordance herewith and submit the same to Plaintiff's counsel for approval as to form only, prior to sending same to the Court.

FRED A. WATSON
DISTRICT JUDGE

xc : Benny Naranjo, Esq.
Michael Newell, Esq.

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

CATHERINE DADDOW,	)
	)
Plaintiff	)
	)
vs.	) No. CV90-191-W
	) Filed April 2, 1993
CARLSBAD MUNICIPAL SCHOOL DISTRICT and the CARLSBAD MUNICIPAL SCHOOL BOARD OF EDUCATION,	)
	)
	)
	)
	)
Defendants.	)

JUDGMENT

This matter having come for hearing before the Court on August 18-21, 1992, and January 4-6, 1993, the Plaintiff appearing in person and through her attorney, Benny R. Naranjo, Esq., and Defendant having appeared through Jeffrey B. Diamond, President of the Carlsbad Municipal School Board and through counsel, Heidel, Samberson & Newell, and the Plaintiff having presented her case through seven (7) days of testimony, the Court finds that Plaintiff's Complaint should be dismissed because she was terminated for just cause, all as

more fully explained in the Court's Decision with Findings of Fact and Conclusions of Law filed on January 29, 1993, and there is no just reason for delay in entering Judgment. Pursuant to NMSA §39-2-9, 1978 (Repl. Pamp. 1991), CMSD is entitled to certification from this Court that more than four witnesses were necessary in defense of Daddow's claims.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Plaintiff's Complaint in the above referenced matter be dismissed with prejudice, and that Defendants have judgment against Plaintiff as set out in the Courts Decision with findings of Fact and Conclusions of Law, which are hereby incorporated herein by reference.

IT IS FURTHER ORDERED, that Defendants' Counterclaim be dismissed, the Court having heretofore ruled and expressing such determination herein that the remedy against Plaintiff for her misfeasance is termination, and not collection of damages.

IT IS FURTHER hereby certified by this court that more than four witnesses were necessary for Defendants'

defense of Plaintiff's claims, and that Defendants shall have judgment against Plaintiff for witness fees in the amount of $1,200.00.

IT IS FURTHER ORDERED, that Defendants have judgment against Plaintiff for Costs of depositions and service of process in the amount of $2,276.17, for a total Judgment amount for costs including witness fees in the amount of $3,476.17.

FRED A. WATSON, District Judge

Approved as to Form:

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By Benny R. Naranjo
Attorney for Plaintiff

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Wednesday, June 12, 1991

NO. 19,872

CATHERINE DADDOW,

Plaintiff-Appellant,

vs.

CARLSBAD MUNICIPAL SCHOOL DISTRICT,
et al.,

Defendants-Appellees.

This matter having come before the Court upon the application of the plaintiff-appellant for an order authorizing an interlocutory appeal, and the Court having considered the application and the response thereto of the defendants-appellees, having heard the oral arguments of the parties, and being otherwise sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the application be, and the same is, hereby granted.

IT IS FURTHER ORDERED that this appeal shall not be assigned to a calendar but is hereby disposed of as follows:

The Interlocutory Order of the District Court of Eddy County entered May 8, 1991, is hereby reversed, on the ground that the plaintiff's complaint states a claim upon which relief can be granted under SCRA 1986, 1-012(B)(6), for alleged wrongful termination of employment and alleged breach of employment agreement. Insofar as plaintiff's amended complaint seeks relief under 42 U.S.C. § 1983, the Court does not rule on the sufficiency of her amended complaint in that regard, and the District Court's Interlocutory Order is neither affirmed or reversed by this order. The Interlocutory Order dismissing plaintiff's claim for relief under 42 U.S.C. § 1983 shall remain an interlocutory order, which the district court is free to amend, revise or reconfirm at any stage of the litigation. If upon conclusion of the litigation in the District Court and entry of a final appealable order either party is aggrieved by the court's disposition of plaintiff's claim for relief under 42 U.S.C. § 1983, said disposition may be reviewed in the appropriate appellate court upon the taking of a proper appeal.

IT IS FURTHER ORDERED that, the interlocutory

appeal having been granted and the appeal having been disposed of, the cause is remanded to the District Court of Eddy County for further proceedings consistent herewith.

ATTEST: A TRUE COPY

ROSE MARIE ALDERETE
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
June 14, 1991

NO. 21,284

CATHERINE DADDOW,

Plaintiff-Appellant
and Cross-Appellee,

vs.

CARLSBAD MUNICIPAL SCHOOL DISTRICT,
and CARLSBAD MUNICIPAL BOARD OF
EDUCATION,

Defendants-Appellees
and Cross Appellants.

ORDER

This matter coming on for consideration by the Court upon motion for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing hereby is DENIED.

ATTEST: A TRUE COPY

Kathleen Jo Gibson

Clerk of the Supreme Court

of the State of New Mexico

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

MANDATE NO. 21,284

TO THE DISTRICT COURT sitting within and for the County of Eddy, GREETINGS:

WHEREAS, in cause numbered CV-90-191-W on your civil docket, wherein Catherine Daddow was plaintiff, Carlsbad Municipal School District and Carlsbad Municipal School Board of Education were defendants, and order was entered dismissing plaintiff's complaint and denying defendants' request for damages;

WHEREAS, the cause and order were afterwards brought into this Court by plaintiff for review by appeal and by defendants for review by cross-appeal, whereupon such proceedings were had that on May 2, 1995, an opinion was issued reversing the decision of the trial court on the question of whether a section 1983 action for money damages may be brought against a local school board and affirming the order and judgment of the court.

WHEREAS, a motion for rehearing was filed on May 17, 1995, and denied on June 14, 1995.

NOW, THEREFORE, this cause is remanded to you for further proceedings, if any, consistent and in conformity with the opinion of this Court.

WITNESS, the Hon. Joseph F. Baca, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of June, 1995.

(SEAL)

s/ Kathleen Jo Gibson, Chief Clerk of the Supreme Court of the State of New Mexico

ATTEST: A TRUE COPY

Kathleen Jo Gibson
Supreme Court Clerk